Supreme Court, U.S.
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No. 90-1309

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

GENERAL ELECTRIC COMPANY,
NATIONAL RAILROAD PASSENGER CORPORATION,
CITY OF PHILADELPHIA, SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY, MONSANTO COMPANY, and
CONSOLIDATED RAIL CORPORATION,
Petitioners,

v.

MARY ALICE KNIGHT, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When plaintiffs claim that various illnesses were caused by exposure to a chemical, but present no evidence of causation except opinions of experts who can cite no support in human epidemiological, clinical or toxicological data:

   (a) Are those Circuits correct that allow and encourage district judges, without collateral trial-type hearings, to exclude such opinions under Federal Rules of Evidence 403, 702 or 703?

   (b) Are those Circuits correct that decline to reverse such exclusions unless "manifestly erroneous"?

   (c) Are those Circuits correct that hold, under this Court's *Celotex* trilogy, that scientifically unsupported opinions cannot create a "genuine issue of material fact" to prevent summary judgment?

2. Does it violate the rule of *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), for a United States Court of Appeals, reversing a district court, to declare a new state cause of action because it "predicts" that for "policy" reasons the state's courts some day will do so?

3. Under 28 U.S.C. § 1291, as construed in *FirsTier Mortgage Co.* v. *Investors Mortgage Ins. Co.*, 111 S. Ct. 648 (1991), must an appeal be taken from a final order, without regard to a subsequent judgment under Rule 54(b), Fed. R. Civ. P.?

LIST OF PARTIES

Petitioners in this Court are General Electric Company, National Railroad Passenger Corporation, the City of Philadelphia, Southeastern Pennsylvania Transportation Authority, Monsanto Company, and Consolidated Rail Corporation.

Respondents are Mary Alice Knight, Andre Williams, Sr., John Ingram, Sr., Patricia Ingram, Christopher S. Brown, Cathlene Brown, Craig Brown, Catherine D. Brown, Margherita Barbetta, Mary Retta Johnson, Celeste Brown, Clemmon L. Brown, Cloyd H. Brown, Curtis Brown, William Reid, Jr., Mabel Brown, Helen V. Narcise, Matthew Cunningham, Bessie Cunningham, George Albert Burrell, Priscilla Etheridge Burrell, Wallace Darryl Cummins, K. Louise Jones, Charles W. Stanbach, Susanna Stanbach, William Butler, Theresa Butler, Allen K. Simpson, Marvin L. Simpson, Karen R. Simpson, Donald E. Simpson, and Bryan M. Jackson.

LIST PURSUANT TO RULE 29.1

Petitioner General Electric Company is a publicly held New York corporation with no parent companies. Its subsidiaries, other than wholly owned subsidiaries and subsidiaries whose shares or debt securities are not publicly held, are General Electric Capital Corporation; General Electric Credit Corporation; General Electric Credit International, N.V.; General Electric Overseas Capital Corporation; and RCA Corporation.

Petitioner National Railroad Passenger Corporation is a District of Columbia corporation authorized by the Rail Passenger Service Act of 1970, 84 Stat. 1328, 45 U.S.C. §§ 501 *et seq.* Its capital stock is owned by the United States. It has no subsidiaries other than wholly owned subsidiaries.

Petitioner the City of Philadelphia is a Pennsylvania City of the First Class, pursuant to 53 PENNA. STAT. § 101.

Petitioner Southeastern Pennsylvania Transportation Authority is a Metropolitan Area Transportation Authority created under Article III of the Pennsylvania Urban Mass Transportation Law, 55 PENNA. STAT. § 600.303, by terms of which it is "a separate body corporate and politic" which shall "exercise the public powers of the Commonwealth as an agency and instrumentality thereof." It has no subsidiaries.

Petitioner Monsanto Company is a publicly held Delaware corporation with no parent companies. Its subsidiaries, other than wholly owned subsidiaries, are Invitron Corporation; Southwall Technologies, Inc.; LTX; and Valid Logics. Monsanto's wholly owned subsidiary InnoVen II Corporation owns a less-than-five-percent common stock interest in the following publicly held corporations: Dynamic Sciences International; Micro General Corporation; Xylogics, Inc.; and WEITEK Corporation.

Petitioner Consolidated Rail Corporation is a publicly held Pennsylvania corporation with no parent companies. It has no subsidiaries other than wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in these consolidated cases September 20, 1990.

OPINIONS BELOW

The opinion of the District Court granting summary judgment is reported in part at 706 F. Supp. 358 and appears in the Appendix at A. 91a.[1] The original opinion of the Court of Appeals is at A. 1a. The first set of amendments to the opinion of the Court of Appeals appears at A. 86a, and the second set of amendments at A. 88a. A version incorporating both sets of amendments is reported at 916 F.2d 829.

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[1] Citations to "A." are to the appendix to this petition and to "R." to the appendix filed in the Court of Appeals.

JURISDICTION

The opinion and order of the District Court granting partial summary judgment as to personal injury claims were entered November 29, 1988. A. 91a, 138a. Its order certifying the partial summary judgment as a final judgment was entered January 4, 1989. A. 140a. The judgment and first opinion of the Court of Appeals were entered September 20, 1990. A. 1a. Timely petitions for rehearing were filed October 5, 1990. Rehearing was denied November 23, 1990. A. 143a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE AND RULES INVOLVED

Title 28 U.S.C. § 1291, Rules 54 and 56 of the Federal Rules of Civil Procedure, Rules 104, 402, 403, 701, 702 and 703 of the Federal Rules of Evidence, and Rule 4 of the Federal Rules of Appellate Procedure appear at Appendix J, A. 146a.

STATEMENT

These are pendent jurisdiction claims brought in the United States District Court for the Eastern District of Pennsylvania.[2] The plaintiffs, respondents here, claimed to have suffered forty-seven different kinds of illness from living near the Paoli Railroad Yard, where transformer fluid containing fire-retardant PCBs (polychlorinated biphenyls) was released over a period of years into the air and soil.[3] Some of them, not claiming

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[2] The personal injury claims, arising under Pennsylvania law, were appended to claims for property damage under § 113 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 94 Stat. 2767, 2795, 42 U.S.C. § 9613(b). Three plaintiffs claimed occupational injury under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, from working at the Yard. Some complaints were removed from state court.

[3] The measurements of the plaintiffs' blood showed, and a special U.S. Public Health Service study concluded, that even though PCB fire-retardant fluid had been spilled at the Paoli yard, the few parts per billion (ranging from none to 33) detected in the plaintiffs'

that any present injury existed, sought to recover for fear, emotional distress, and costs of future medical examinations to monitor their health for possible future illness.

This petition is limited to issues concerning: (1) whether the district court was within its authority in rejecting opinions of experts offered to prove causation; (2) whether a federal court may create a new state tort cause of action for "medical monitoring;" and (3) appealability of interlocutory orders at a time they have not been certified as final.

A. The Expert Opinions.

Nowhere in the record was there any published or unpublished study, based on human epidemiology, clinical data or toxicology, that concludes that PCBs at any exposure level are capable of causing any of the forty-seven illnesses alleged.[4] Also totally absent were any clinical diagnoses concluding that these plaintiffs' particular ailments were caused by PCBs instead of by any of a number of recognized potential causes.

As their evidence that PCBs had caused all these illnesses, plaintiffs relied entirely upon opinions of five experts. Two of those witnesses declared on behalf of nineteen and three plaintiffs, respectively, that each illness complained of had indeed been caused by PCBs from the Paoli Railroad Yard. The other three gave more limited opinions. In summary:

—Deborah Barsotti, Ph.D., a toxicologist, swore "to a reasonable scientific certainty" that PCBs had caused

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bodies was within the range considered normal for residents of the United States. Plaintiffs contested the value of the norm; that issue is not included in this petition.

[4] These were alleged to include, *e.g.*, asthma, insomnia, anemia, anorexia, swollen hands, seizures, enlarged prostate, Parkinson's Disease, cardiovascular disease, arthritis, gastritis, lung disease, brain cancer, pancreatic cancer, muscle cramps, irritability, and stiff joints.

every medical or psychiatric complaint of nineteen respondents, none of whom she had ever met. When deposed, she repeatedly acknowledged that those ailments could also have had other causes, *e.g.*, R. 5352, 5354, 5380, 5559, 5812, and that she had not attempted to exclude those other explanations because "I don't diagnose. I'm not a physician." R. 5634.[5] When confronted with her own past writings, she testified that in articles she had coauthored "we recognized the fact" that whether PCBs could cause any adverse effects to human beings "has not been determined." R. 5798.

—Harry Shubin, M.D., on behalf of three plaintiffs explained that his scientific method was simply to attribute all their adverse medical conditions to PCBs "until I would be shown that I was wrong." R. 6394. He testified that he had not made any systematic review of the scientific literature; instead, he relied for authority principally on newspaper reports. R. 6471-72, 6389-94, 6411, 6416, 6491.

—Arthur C. Zahalsky, Ph.D., an "immunologist" who had attended only one graduate-level course that included immunology, simply offered his blanket opinion that PCB exposure had caused "alterations" (not necessarily injuries) to all the respondents' immune systems, although he said he had performed no examinations or tests. He also testified that "certainly" there could be other causes. R. 6297. When asked to name any studies on which he re-

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[5] When asked to identify any published study to support her statement that PCBs could cause, for example, cardiovascular disease, she testified that "I can't draw them to mind at this time" and "I can't at this point in time find out . . . or can I remember the source of that article." R. 5117, 5119. When asked to cite any study associating PCBs with the asthma she opined they had caused in persons with a family history of asthma, she testified that "I can't recall that in the literature that that specific respiratory ailment has been associated with PCB exposure." R. 5159.

lied, he replied he could name "[n]ot even one" because "I don't recall them." R. 6267.[6]

—G. John DiGregorio, M.D., on behalf of nine respondents testified that his "only finding" was that they suffered from "anxiety" and that "I have not been able to establish any physical findings yet." R. 7160. He added that "we haven't been able to determine the chronic effects" of PCBs. R. 6971, 7309.

—Finally, William J. Nicholson, Ph.D., a physicist practicing industrial hygiene, filed an affidavit in which he stated that after a search of existing studies on PCBs, in the form of a "meta-analysis," he concluded that the scientific literature supported a conclusion (even though no study had so concluded) that PCBs could cause liver, gall bladder and biliary tract cancer. R. 9377. However, none of those diseases was among the forty-seven different ailments complained of by respondents.

B. The District Court's Ruling.

When petitioners moved for summary judgment, the District Court examined the opinions and over 2400 pages of deposition testimony of these proffered experts, and held that such opinions were plainly unsupported by data or methods reasonably relied upon by scientists in the pertinent disciplines. It explained that "Even if I found that plaintiffs' experts testimony reached the level of being probative, I would rule to exclude it under Rule 703 and 403 as 'unhelpful' and more prejudicial than probative." A. 110a. Citing also Rule 702's requirement that expert opinion testimony "will assist the trier of fact," the District Court found that "plaintiff's experts' opinions are not admissible because they are not sufficiently scientifically reliable," A. 123a, and emphasized that a crucial requisite of admissibility was missing:

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[6] Dr. Zahalsky explained, R. 6275:

"Q. So you're saying that because these people have the conditions they have, you think that's enough to show that they got them from being exposed to PCBs, is that right?

A. Yes, I do."

that these were not opinions founded on data and methods scientists really use; instead, the proffered experts simply asserted personal opinions not based on scientific data and methodology. The Court observed that if it did not exclude such opinion testimony, then "any case in which an expert was willing to use two sets of magic words would always survive motions for summary judgment and directed verdict," and "then Rule 703 should read: 'An expert may cite as the basis of his opinion anything he likes.'" A. 107a.

The District Court proceeded to grant partial summary judgment for petitioners on the personal injury claims because of absence of proof of causation.[7] A. 125a-137a, 138a. Later it certified its order as a final judgment under Fed. R. Civ. P. 54(b).[8] A. 140a. The Court held that under this Court's decisions in *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986), and *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986), respondents had failed to come forward with evidence sufficient to create a genuine issue of material fact to establish causation. It explained that even if these opinions were treated as admissible, they lacked scientific basis, and respondents further had failed to produce even one epidemiological study or differential diagnosis—*i.e.*, a diagnosis based upon consideration and elimination of other possible causes—that concluded that exposure to PCBs had actually resulted in harm to a plaintiff. A. 98a, 109a-110a, 124a; see A. 49a-50a. The District Court emphasized that, as it understood this Court's decisions, "[s]ummary judgment is not precluded merely because a party has produced an expert . . . who brings little more than his credentials and a subjective opinion." A. 99a.[9]

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[7] It alternatively granted summary judgment also for failure to produce evidence of unusual exposure. That ruling, which the Court of Appeals also reversed, is not included in this petition.

[8] Nine of the twenty-two consolidated appeals were noticed before the certification, and were taken from the interlocutory partial summary judgment order. See pp. 27-29, *infra*.

[9] Citing also *Merit Motors, Inc.* v. *Chrysler Corp.*, 569 F.2d 666, 673 (D.C. Cir. 1977), *Viterbo* v. *Dow Chem. Co.*, 826 F.2d 420, 424

C. The Court of Appeals' Reversal.

The Court of Appeals reversed every ruling of the District Court. It chastised the District Court for "[p]recipitous" and "unfair and improper" application of Rule 403, which permits trial judges to exclude evidence that on balance is prejudicial or confusing. A. 72a. It held that Rule 403 was an "extreme measure" that should "rarely" be used at summary judgment, and that to do so "a court must have a record complete enough on the point at issue to be considered a virtual surrogate for a trial record." *Id.* The thousands of pages of opinions and testimony on which the District Court had based its ruling, the Court of Appeals held, were not enough. The Court of Appeals held that these five experts—although they presented no human clinical, toxicological or epidemiological basis for their conclusions, did not exclude other obvious causes, and according to an affidavit by twelve leading academic scientists were not practicing science at all—nevertheless should have been respectfully treated by the District Court as "on the cutting edge of scientific research." A. 71a-72a.

The Court of Appeals also rejected the District Court's exclusions under Rules 702 and 703. In doing so the Court of Appeals limited its discussion of four of the five causation witnesses to a single paragraph, A. 70a-71a, in which it acknowledged that the arguments against admissibility of their opinions "are forceful." A. 70a. Nevertheless, it reversed the District Court as to every one because, despite these experts' own testimony admitting absence of support for their conclusions, "there has not been adequate process." A. 71a. It said the District Court should have held an *in limine* hearing even though the plaintiffs themselves had opposed it. A. 61a-62a. The opinion separately discussed the fifth causation expert, Dr. Nicholson, who had offered only his "meta-analysis" literature review; the Court of Appeals

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(5th Cir. 1987), and *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223, 1258-59 (E.D.N.Y. 1985) (Weinstein, J.), *aff'd on other grounds*, 818 F.2d 187 (2d Cir. 1987).

held meta-analysis should be admissible, A. 64a-70a, but brushed aside the District Court's alternative basis for excluding Nicholson's conclusions: that they were simply irrelevant, because Nicholson did not opine that PCBs could cause or had caused any of the ailments complained of. A. 118a-119a.

Turning to the District Court's summary judgment holding—that even if allowed as evidence, such unsupported opinions could not create a genuine issue of material fact—the Third Circuit also disposed of it in only a few sentences. It reversed the summary judgment because, it said, "[b]oth Drs. Barsotti and Nicholson testified to a positive correlation between PCB exposure and human illness," A. 77a, that they and the other three causation witnesses "gave testimony, with reference to [unspecified] scientific studies," *id.*, and that on that basis "a jury could infer that there is a causal relationship between PCB exposure and the various illnesses contracted by plaintiffs." *Id.* The Court of Appeals was silent as to how, even if shown, a "positive correlation between PCB exposure and human illness" could establish causation of particular illnesses of particular individuals under the applicable more-probable-than-not burden of proof.

The Court of Appeals also established a new state tort by which it held that all the plaintiffs, whether claiming present injury or not, should be able to recover for indefinite future "medical monitoring" of their health; it did so even though it acknowledged that the courts of Pennsylvania had never allowed recovery for risk without present physical injury, and even though the District Judge, sitting in Pennsylvania, had held that Pennsylvania law provides no such cause of action. A. 53a, 112a-113a, 124a. The Third Circuit announced that "the policy reasons for recognizing this tort are obvious," A. 57a, and that "[w]e . . . predict that the Supreme Court of Pennsylvania would . . . recognize a cause of action for medical monitoring." A. 56a.

Twice in response to petitions for rehearing the Court of Appeals issued extensive amendments to its opinion.

A. 86a-87a, 88a-90a. It then denied rehearing and rehearing *en banc*. A. 143a.

REASONS FOR GRANTING THE WRIT

The present case focuses what Judge Patrick E. Higginbotham just over a year ago called "one of the more vexing problems currently facing the federal courts —the role of experts." *Brock* v. *Merrell Dow Pharmaceuticals, Inc.*, 884 F.2d 167, 168 (5th Cir. 1989) (dissent from denial of rehearing *en banc*), *cert. denied*, 110 S. Ct. 1511 (1990).

This Court in fundamental rulings five years ago emphasized the duty to grant summary judgment against claims unsupported by true evidence. It has also directed that district judges be allowed wide discretion to admit or exclude expert opinions, thereby authorizing them to ensure that opinions put before a jury are really science and not something else. Applying this Court's guidance, the courts of appeals in several Circuits have respected district court rulings that exclude unsupported "expert" opinions about chemical causation.

The Third Circuit here, however, has issued a set of rulings and directions vastly different from those of other Circuits, and not reconcilable with this Court's prior decisions. The Third Circuit here has undone a district judge's serious attempt, in applying the Federal Rules of Evidence and Civil Procedure, to set some modest limits to the power of a party to put before a jury assertions about causation based on methodology and reasoning that are not recognizable as science at all. This is a constant current problem for district judges. For nowadays "there is not much difficulty in finding a medical expert witness to testify to virtually any theory of medical causation short of the fantastic." *Stoleson* v. *United States*, 708 F.2d 1217, 1222 (7th Cir. 1983).

Until the Third Circuit's decision, two screens had been applied in the federal courts to set some outer limits on the opinions of experts that could be put before a jury.

The first was the Federal Rules of Evidence, which in Rules 104, 403, 702 and 703 authorize district judges to exclude "expert" testimony which falls below minimum standards of scientific basis. In an increasing number of decisions, district courts exactly like the district court here have had to exercise that authority and duty, and courts of appeals in other Circuits have affirmed them, reasoning that "[i]f an opinion is fundamentally unsupported, then it offers no expert assistance to the jury." *Viterbo* v. *Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987).

The second restraint was summary judgment under Rule 56 of the Federal Rules of Civil Procedure, which, as this Court explained in three landmark decisions five years ago, recognizes that some evidence is simply too spurious and unreliable to create a genuine issue of material fact. *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986). That route has also been followed in several Circuits to stop litigation dependent on expert opinions when "the plaintiff's expert brought to court little more than his credentials and a subjective opinion." *Viterbo*, *supra*, at 421; see also, *e.g.*, *Richardson* v. *Richardson-Merrell, Inc.*, 857 F.2d 823, 829 (D.C. Cir. 1988) (judgment notwithstanding verdict is proper even though "a party has produced an expert to support its position"), *cert. denied*, 110 S. Ct. 218 (1989). Often the appellate cases, like the District Court's opinion here, refer both to the inadmissibility of unsupported opinions, and to the inability of such statements to create a genuine issue of material fact.

Yet in the face of this body of law that most Circuits have been developing to apply the Federal Rules and the *Celotex* trilogy to the flood of "toxic tort" litigation, the Third Circuit, for several years increasingly unwilling to allow exclusion of expert opinions,[10] has now firmly

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[10] See, *e.g.*, *DeLuca* v. *Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 952-57 (3d Cir. 1990) (reversing exclusion of expert

committed itself to reversing the trend. At the very same time other Circuits are urging tighter judicial control of opinion testimony,[11] the Third Circuit here instead

—Holds that pretrial exclusions of expert testimony under Rule 403 are "an extreme measure that is rarely necessary" and "should rarely be granted," and then only based upon "a virtual surrogate for a trial record." A. 72a.

—Holds that exclusions under Rules 702 and 703 normally should not be made without *in limine* hearings, even when a full testimonial record for summary judgment already exists.

—Holds that it will review exclusions of expert testimony on an abuse-of-discretion standard, disregarding the clear direction by this Court that such exclusions are "to be sustained unless manifestly erroneous." *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 (1962). A. 64a n.33.

—Holds that, without human clinical, epidemiological, or toxicological support, "experts" may prevent summary judgment simply by asserting their scientifically unsupported personal beliefs that PCBs here caused all of forty-seven unrelated human illnesses.

—Rejects, as it has in the past, the rule of *Frye* v. *United States*, 293 Fed. 1013 (D.C. Cir. 1923), that

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opinion); *Habecker* v. *Copperloy Corp.*, 893 F.2d 49, 52 (3d Cir. 1990) (same); *Linkstrom* v. *Golden T. Farms*, 883 F.2d 269, 270 (3d Cir. 1989) (same). See also *Hines* v. *Consolidated Rail Corp.*, No. 89-1350 (3d Cir. Feb. 13, 1991) (same), reiterating "the Third Circuit's 'broad' and 'liberal' standard of admitting expert testimony." Slip op. at 24.

[11] *E.g.*: "Our message to our able trial colleagues: it is time to take hold of expert testimony in federal trials." *In re Air Crash Disaster*, 795 F.2d 1230, 1234 (5th Cir. 1986). See also *Richardson* v. *Richardson-Merrell, Inc.*, 857 F.2d 823, 831 n.59 (D.C. Cir. 1988) ("special care should be exercised in evaluating the reliability and probative worth"), *cert. denied*, 110 S. Ct. 218 (1989); *Brock* v. *Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307, 315 ("encouraging district judges faced with medical and epidemiologic proof in subsequent toxic tort cases to be especially vigilant"), *modified*, 884 F.2d 166 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1511 (1990).

expert opinion testimony must be based on generally accepted scientific principles.

If, as the Third Circuit holds, the District Court erred in granting summary judgment on such a record, then summary judgment effectively is no longer available to parties attempting to defend against "toxic tort" claims.

Finally, the Third Circuit here, in the face of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), and the holding of the District Court, invented a new state tort. It acknowledged that Pennsylvania's Legislature and courts (like nearly all others in this country) have never enacted a tort of "medical monitoring," which would allow plaintiffs to recover without any proof of present injury; in fact, a series of recent Pennsylvania decisions, respected by federal district judges, hold that Pennsylvania does not allow tort recovery in the absence of present physical injury. Yet the Third Circuit here announced that although "the Pennsylvania Supreme Court has expressed some reluctance to recognize claims for enhanced risk of harm," A. 53a, nevertheless the Third Circuit would "predict" into existence, A. 56a, for "policy reasons," A. 57a, a new and virtually unbounded state-law cause of action.[12]

It is unlikely that this Court will soon have before it any case that more starkly frames, on a fully developed record, these issues of judicial responsibility in an expanding and controversial sector of federal litigation.

I. THE THIRD CIRCUIT'S STANDARDS FOR REVERSAL OF EXCLUSION OF OPINION TESTIMONY CONFLICT WITH DECISIONS OF THIS COURT AND NINE OTHER CIRCUITS.

Originally a small and convenient exception to the general prohibition of opinion testimony, see Fed. R. Evid. 701, "expert" opinions now have taken center stage in

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[12] Also, the Third Circuit's holding that an invalid appeal from an interlocutory order can be cured by a later Rule 54(b) certification would merit grant of certiorari in itself. See pp. 27-29, *infra*.

much litigation in the federal courts. In cases like these, where "toxic tort" plaintiffs claim that injury (or potential injury) has been caused by exposure to minute amounts of chemicals, "expert" opinions usually are essential.

This creates a dilemma, with which the courts of appeals and the district courts have been struggling—up to now with some success. On the one hand, expert opinions usually are the only evidence plaintiffs can present to establish causation. On the other hand, "expert" witnesses for hire abound, and if some are allowed to tell juries opinions having no basis in anything recognizable as science, then juries are being misled into regarding as "expert" a kind of opinion that in fact has no more evidentiary worth than any layperson's.

What most district courts have been doing, and most courts of appeals approving, is to exercise the district courts' authority under Rule 104 of the Federal Rules of Evidence to exclude the very worst instances of unsupported "expert" opinions—colloquially termed "junk science"—by invoking Federal Rules of Evidence 403 (excluding testimony that is on balance too prejudicial or confusing) or 702 and 703 (setting the standards of helpfulness and whether the opinions are based upon facts or data "of a type reasonably relied upon by experts in the particular field"). The District Court did exactly that here.

The Third Circuit, however, has brought even this kind of minimal scrutiny to a sudden halt, and instead directed that henceforth opinions of "experts" are "rarely" to be excluded, and then only after elaborate new procedures of the Third Circuit's own creation. Its directive is inconsistent with the Federal Rules of Evidence and with this Court's few, but firm, decisions on the subject; even more strikingly, it is a total departure from the efforts of other Circuits to bring rationality and order to this important procedural area.

A. The Third Circuit's Reversal of Exclusion of Unsupported Expert Opinions Conflicts with Decisions of the First, Second, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits.

1. *Conflict as to Speculative Opinions.*

In depositions these experts were forced to explain the scientific basis for their blanket causation conclusions—and on all the key points admitted that they had none. It is unlikely that a plainer record of speculation masquerading as science has ever been compiled. If it was reversible error for the District Court to examine such a record and exclude such opinions, then in federal toxic tort cases, anything goes.

But that is not the law applied in the other Circuits. They allow and indeed require district courts to exclude "expert" opinions that rest on unscientific speculation. The inter-Circuit conflict raised by the Third Circuit's ruling is massive, as a simple listing of recent decisions demonstrates:

1. **First Circuit:** *Lynch* v. *Merrell-National Labs.*, 830 F.2d 1190, 1196-97 (1st Cir. 1987): "the district court's firm rejection here of foundationless expert testimony was necessary, admirable, and entirely within the discretion of the court under Federal Rules of Evidence 403 and 703."

2. **Fifth Circuit:** *Viterbo* v. *Dow Chem. Co.*, 826 F.2d 420, 424 (5th Cir. 1987): widely cited holding that "[w]ithout more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible."

Slaughter v. *Southern Talc Co.*, 919 F.2d 304, 306-07 (5th Cir. 1990): affirms district court's exclusion of expert's "bare conclusions," because "Federal Rule of Evidence 703 requires courts to examine the reliability of an expert's sources to determine whether they satisfy the threshold established by the rule."

3. **Sixth Circuit:** *Sterling* v. *Velsicol Chem. Corp.*, 855 F.2d 1188, 1208-09 (6th Cir. 1988): district court

erred in failing to exclude scientific opinions that lacked "conformity to a generally accepted explanatory theory."

Coal Resources, Inc. v. *Gulf & Western Industries, Inc.*, 865 F.2d 761, 772 n.4 (6th Cir. 1989): "Although F.R.E. 703 has greatly liberalized the law regarding the type of information on which an expert may base his opinion . . . that liberalization has not eliminated the requirement that an expert ground his opinion on reliable data rather than pure speculation."

4. **Ninth Circuit:** *McGlinchy* v. *Shell Chem. Co.*, 845 F.2d 802, 807 (9th Cir. 1988): "His study rests on unsupported assumptions . . . . Lacking any sound foundation, the study would mislead a jury . . . ."

5. **Tenth Circuit:** *Lima* v. *United States*, 708 F.2d 502, 507 (10th Cir. 1983): affirms district court's rejection of physician's testimony that "did not reach the threshold standards for admissibility as set forth under Fed. R. Evid. 703."

6. **Eleventh Circuit:** *Hull* v. *Merck & Co.*, 758 F.2d 1474, 1477 (11th Cir. 1985): when physician reached conclusion by assuming (like Drs. Zahalsky and Shubin here) that the chemical caused the injury, "The district court was well within its discretion in excluding the evidence."

7. **Second Circuit** (district court): *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1267, 1283 (E.D.N.Y. 1985), *aff'd on other grounds*, 818 F.2d 187 (2d Cir. 1987): "The unfounded assumptions and speculation underlying Dr. Carnow's testimony reduce its probative value to a point approaching zero." [13]

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[13] See also *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223, 1250, 1260 (E.D.N.Y. 1985) (Weinstein, J.), *aff'd on other grounds*, 818 F.2d 187 (2d Cir. 1987): physicians' opinions were "insufficient as a basis for a finding of causality because they fail to consider critical information":

> "careful scrutiny of proposed evidence is especially appropriate in the toxic tort area. The uncertainty of the evidence in such cases, dependent as it is upon speculative scientific hypotheses and epidemiological studies, creates a special need for robust

It is utterly clear that if the District Court's exclusion of such facially unsupported and speculative testimony had been appealed in any Circuit but the Third, it would have been affirmed. In some Circuits it might well have been affirmed summarily or routinely.[14]

2. *Conflict as to Causation Opinions Contrary to Epidemiological Evidence.*

The plaintiffs provided no epidemiological studies connecting PCBs to the illnesses complained of at all.[15] In fact the record contained extensive epidemiological studies concluding there is no such connection.

Several Circuits have developed a rule that "toxic tort" causation opinions that are not supported by—or as here fly in the face of—epidemiological studies and data, are inadmissible. Thus recently in *Ealy* v. *Richardson-Merrell, Inc.*, 897 F.2d 1159, 1160 (D.C. Cir.), *cert. denied*, 111 S. Ct. 370 (1990), the District of Columbia Circuit declared it a "binding rule" that an expert opinion on causation "is without scientific foundation under Federal Rule of Evidence 703 in the face of 'a wealth of published epidemiological data' to the contrary," quoting in part *Richardson* v. *Richardson-Merrell, Inc.*, 857 F.2d 823, 832 (D.C. Cir. 1988), *cert. denied*, 110 S. Ct. 218 (1989). *Accord*, *Wilson* v. *Merrell Dow Pharmaceuticals, Inc.*, 893 F.2d 1149, 1155 (10th Cir. 1990); *Lynch* v. *Merrell-National Labs.*, 830 F.2d 1190, 1194 (1st Cir. 1987). "The federal

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screening of experts and gatekeeping under Rules 403 and 703 by the court."

[14] *E.g.*, *Amato* v. *Syntex Labs., Inc.*, 917 F.2d 24, 1990 U.S. App. Lexis 19210 (6th Cir. 1990) (unpublished) ("In order to be admissible, such [expert] testimony must be supported by more than qualifications and a subjective opinion that 'it is so' ").

[15] In two incidents in Japan and Taiwan, some human beings accidentally ate rice oil heavily contaminated with chemicals including PCBs and suffered skin reactions and some other acute effects, nearly all different from those claimed here; plaintiffs' own expert concluded that "it is now clear that the majority of the Yusho-Yu Cheng symptoms can be attributed to other compounds," and "[t]he findings cannot be attributed to the Yusho patients' PCB exposure." R. 8907-08; R. 8900.

courts have held that . . . expert opinion which is not based on epidemiological evidence is not admissible to establish causation . . . ." *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 727 F. Supp. 570, 575 (S.D. Cal. 1989). The Third Circuit, however, here holds the contrary, and the Eleventh likewise has held that epidemiological evidence is not essential. *Wells* v. *Ortho Pharmaceutical Corp.*, 788 F.2d 741, 744-45 (11th Cir.), *cert. denied*, 479 U.S. 950 (1986). The split is clear and should be resolved.

3. *Conflict as to Causation Opinions Extrapolating From Animal Experiments.*

The District Court, observing that "[t]here are federal court cases on both sides," A. 105a, excluded opinions insofar as they referred to studies of diseases induced by massive doses applied to laboratory animals. A. 108a.[16] The Court of Appeals held that there was insufficient factual basis for that ruling. A. 58a-59a.

"[J]urisdictions are in disagreement over the admissibility of expert medical or scientific testimony based on animal studies. . . ." *Ball* v. *Joy Manufacturing Co.*, 1990 U.S. Dist. Lexis 16011 n.5 (S.D.W. Va. 1990). Several Circuits have ruled that, whatever animal studies may indicate about avenues for further research, or risk assessment decisions for regulatory agencies, they are not probative in a tort action to base opinions of causation in human beings—particularly when, as here, all the epidemiological evidence shows the contrary. "Studies of this sort [involving animals], singly or in combination, do not have the capability of proving causation in human beings in the absence of any confirmatory epidemiological data." *Lynch* v. *Merrell-National Labs.*, 830 F.2d 1190, 1194 (1st Cir. 1987). The District of Columbia Circuit agrees that "[a]t least where epidemiological evidence was available, animals studies 'are of so little probative force and are so potentially misleading as to

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[16] Feeding or injecting laboratory animals with large doses of PCBs produced liver cancer (not complained of by any plaintiff) and some acute effects, almost none of which were among the numerous diseases alleged by plaintiffs.

be inadmissible.'" *Richardson* v. *Richardson-Merrell, Inc., supra,* 857 F.2d at 830, 831 n.59, quoting in part *In re "Agent Orange" Product Liability Litigation, supra,* 611 F. Supp. at 1241. The Fifth and Seventh Circuits have similar holdings. *Viterbo* v. *Dow Chem. Co., supra,* 826 F.2d at 424; *Brock* v. *Merrell Dow Pharmaceuticals, Inc., supra,* 874 F.2d at 313 (animal studies are "of questionable applicability to humans"); *International Union, UAW* v. *Johnson Controls, Inc.,* 886 F.2d 871, 889 (7th Cir. 1989) (*en banc*) (animal studies "speculative and unconvincing"), *cert. granted,* 110 S. Ct. 1522 (1990) (No. 89-1215).

In reversing the District Court's exclusion of animal studies here, the Third Circuit again is in company with the Eleventh. See *Wells* v. *Ortho Pharmaceutical Corp.,* 788 F.2d 741, 744-45 (11th Cir.), *cert. denied,* 479 U.S. 950 (1986).

4. Conflict as to Requirement of Generally Accepted Science.

The Third Circuit here relied on its own prior "groundbreaking decision" [17] in *United States* v. *Downing,* 753 F.2d 1224, 1232-41 (3d Cir. 1985), which held that after adoption of Rule 702, expert opinions no longer need reflect "generally accepted" science, as up to then had been required in the leading case of *Frye* v. *United States,* 293 Fed. 1013 (D.C. Cir. 1923).

However, as two Justices of this Court pointed out, some other Circuits do not agree with the Third Circuit, and instead hold that *Frye*'s requirement is still part of Rule 702, which is "an obviously recurring and important issue." *Mustafa* v. *United States,* 479 U.S. 953 (1986) (White and Brennan, JJ., dissenting from denial of certiorari), citing *United States* v. *McBride,* 786 F.2d 45, 49 (2d Cir. 1986), and *Barrel of Fun, Inc.* v. *State Farm Fire & Cas. Co.,* 739 F.2d 1028, 1031 n.9 (5th Cir. 1984). The split remains unresolved and has broadened. See, *e.g., United States* v. *Smith,* 869 F.2d 348, 351 (7th

[17] 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE (1979) (1990 Supp.) 420. See also *id.* ("has the effect of broadening the admissibility of scientific proof").

Cir. 1989) ("this circuit has continued to affirm (and to apply) the *Frye* standard"); *accord*, *Sterling* v. *Velsicol Chem. Corp.*, 855 F.2d 1188, 1208 (6th Cir. 1988); *United States* v. *Christophe*, 833 F.2d 1296, 1299 (9th Cir. 1987); *United States* v. *Shorter*, 809 F.2d 54, 60 (D.C. Cir.), *cert. denied*, 484 U.S. 817 (1987); *United States* v. *Smith*, 776 F.2d 892, 898 (10th Cir. 1985). "The courts and commentators are divided over whether the Federal Rules of Evidence have superseded the *Frye* test." P. GIANNELLI & E. IMWINKELRIED, SCIENTIFIC EVIDENCE 28-29 (1986) (footnotes omitted).

5. Conflict as to New Procedures Required for Rule 403.

In imposing an apparently unwaivable[18] requirement for district judges to hold *in limine* hearings prior to exclusion of experts, and in demanding that from now on to sustain Rule 403 exclusions there must be "a virtual surrogate for a trial record," A. 72a, the Third Circuit has invented barriers to trial judges' authority to make evidentiary rulings that no other Circuit recognizes. Such collateral proceedings should be tools available for a trial judge, not straitjackets. They certainly are not required by Federal Rule of Evidence 104, which without such restrictions authorizes district judges to determine admissibility. The Third Circuit here has simply enacted daunting new procedural obstacles to discourage exclusion of baseless expert opinions.

Calling Rule 403 a "trial-oriented" and "extreme measure" that is "rarely necessary" and should "rarely" be used by district courts on summary judgment, A. 72a, the Third Circuit adds a warning to its district courts that if Rules 702 and 703 are satisfied, "Rule 403 is an

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[18] Although it disclaimed an absolute requirement for all cases, the Third Circuit repeatedly denounced the absence of an *in limine* hearing, A. 23a, 61a, and held that "[o]n this ground alone" it would "have to" reverse. A. 62a. The Court of Appeals in its second set of amendments adhered to that holding even though it finally acknowledged that the plaintiffs themselves had vigorously *opposed* an *in limine* hearing here. A. 61a n.29a; see A. 23a, 61a, 86a-87a, 89a.

unlikely basis for exclusion." *Id.* It relied last week on its holding here to reverse exclusion of expert testimony in another toxic tort case, reiterating that "excluding evidence under Fed. R. Evid. 403 at the pretrial stage is an extreme measure." *Hines* v. *Consolidated Rail Corp., supra,* slip op. at 29. Other Circuits not only do not impose such new procedural obstacles, but tell their district courts exactly the opposite: that they should not forget to use Rule 403 to screen out misleading opinions even if other rules would not.[19]

B. The Third Circuit Applied a Standard of Review Different From the One Prescribed by This Court and Applied in Other Circuits.

Petitioners strenuously argued to the Court of Appeals that the District Court's rulings excluding expert opinions had to stand unless they were "manifestly erroneous." That is the standard of review enunciated by this Court in *Spring Co.* v. *Edgar,* 99 U.S. 645, 658 (1879), and reiterated in *Salem* v. *United States Lines Co.,* 370 U.S. 31, 35 (1962) (emphasis supplied):

> "the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and *his action is to be sustained unless manifestly erroneous.*"

Nevertheless, the Court of Appeals instead reviewed using an abuse-of-discretion standard, as it has in other recent cases on expert testimony.[20] A. 64a & n.33. By that standard, it reversed in spite of what it acknowledged was a "forceful," A. 70a, record supporting the Districts Court's exclusion decision. Far from deferring

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[19] "Even if the court finds a witness qualified under Rule 702, it may still exclude testimony under Rule 403." *Rogers* v. *Raymark Industries, Inc.,* 922 F.2d 1433 (9th Cir. 1991). *Accord, e.g., Nachtsheim* v. *Beech Aircraft Corp.,* 847 F.2d 1261, 1270-71 (7th Cir. 1988); *United States* v. *Brown,* 776 F.2d 397, 401 n.6 (2d Cir. 1985); *Barrel of Fun, Inc.* v. *State Farm Fire & Cas. Co.,* 739 F.2d 1028, 1033 (5th Cir. 1984).

[20] *E.g., Hines* v. *Consolidated Rail Corp., supra,* slip op. at 10; *Habecker* v. *Copperloy Corp.,* 893 F.2d 49, 51 (3d Cir. 1990); *Linkstrom* v. *Golden T. Farms,* 883 F.2d 269, 270 (3d Cir. 1989).

to that Court's judgment, it overturned the District Court's supporting findings with such comments as: "We dismiss out of hand the district court's finding . . . that 'Dr. Nicholson's testimony would confuse the jury . . . .'" A. 65a n.35.

Cases from most Circuits do not so readily reverse evidentiary rulings of district courts. They instead follow *Salem*,[21] which they recognize imposes at least a "clearly erroneous" test. *Edwards* v. *Sears, Roebuck & Co.*, 512 F.2d 276, 292 (5th Cir. 1975). Some other Circuits, however, have occasionally slipped into equating this Court's "manifestly erroneous" standard with abuse of discretion.[22] The meaning of *Salem* plainly needs to be clarified. The standard of appellate review of decisions to exclude expert testimony should be unambiguous and should be the same in all the Circuits.

II. THE THIRD CIRCUIT'S BASIS FOR REVERSING SUMMARY JUDGMENT CONFLICTS WITH THIS COURT'S *CELOTEX* TRILOGY AND WITH DECISIONS IN SEVEN OTHER CIRCUITS.

A. Conflict as to Requirement for Probative Evidence to Support Opinion of Causation.

Without dispute, respondents had the burden to establish causation by presenting sufficient probative evidence that PCBs both were capable of causing, and in fact had

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[21] *E.g.*, *United States* v. *Tutino*, 883 F.2d 1125, 1134 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1139 (1990); *United States* v. *MacDonald*, 688 F.2d 224, 227-28 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983); *Slaughter* v. *Southern Talc Co.*, 919 F.2d 304, 307 (5th Cir. 1990); *Perkins* v. *Volkswagen of America, Inc.*, 596 F.2d 681, 682 (5th Cir. 1979); *Apponi* v. *Sunshine Biscuits, Inc.*, 809 F.2d 1210, 1218 (6th Cir.), *cert. denied*, 484 U.S. 820 (1987); *United States* v. *Lundy*, 809 F.2d 392, 394 (7th Cir. 1987); *United States* v. *Darby*, 857 F.2d 623, 625 (9th Cir. 1988); *Hull* v. *Merck & Co.*, 758 F.2d 1474, 1477 (11th Cir. 1985); *Coleman* v. *Parkline Corp.*, 844 F.2d 863, 865-66 (D.C. Cir. 1988); *Milmark Services, Inc.* v. *United States*, 731 F.2d 855, 860 (Fed. Cir. 1984).

[22] *E.g.*, *Apostol* v. *United States*, 838 F.2d 595, 599 (1st Cir. 1988); *Wilmington* v. *J.I. Case Co.*, 793 F.2d 909, 919 (8th Cir. 1986); *Sanchez* v. *Safeway Stores, Inc.*, 451 F.2d 998, 1000 (10th Cir. 1971).

caused, each of the numerous injuries complained of. Yet they admittedly presented no opinions at all based on diagnoses excluding other likely causes (differential diagnoses), and instead relied upon assertions unsupported by human clinical, epidemiological or toxicological evidence.

In *Celotex Corp.* v. *Catrett*, *supra*, this Court considered the exposure (rather than causation) aspect of a toxic tort claim, and held that "Rule 56(c) mandates the entry of summary judgment" when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case." 477 U.S. at 322. In *Anderson* v. *Liberty Lobby, Inc.*, *supra*, it held that "If the evidence is merely colorable . . . or is not significantly probative . . . summary judgment may be granted." 477 U.S. at 249-50.

The Court of Appeals did not explain how the *ipse dixit* pronouncements of these experts, lacking scientific support, could be "significantly probative" of causation of every one of the plaintiffs' forty-seven illnesses, or even of one.[23] And it declined even to mention the decisions of other courts of appeals on which the District Court had relied in finding that such speculative and unsupported opinions lack probative value. *Richardson* v. *Richardson-Merrell, Inc.*, *supra*; *Viterbo* v. *Dow Chem. Co.*, *supra*.

Little more than a year ago, in directing dismissal of a claim based on expert opinions that had more support than those in the present case, the Fifth Circuit gave its district judges a direction diametrically opposed to the Third Circuit's here:

> "courts must critically evaluate the reasoning process by which the experts connect data to their conclusions . . . . [S]peculation unconfirmed by epidemiologic proof cannot form the basis for causation in a court of law."

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[23] Nor did it explain how an affidavit by Dr. Nicholson blaming PCBs only for three *other* illnesses could block summary judgment when, as the District Court recognized, A. 118a-119a, an irrelevant affidavit cannot create a genuine issue of material fact. *Edwards* v. *Aguillard*, 482 U.S. 578, 595 (1987).

Brock v. *Merrell Dow Pharmaceuticals, Inc.*, *supra*, 874 F.2d at 310, 315. *Accord*, *Thompson* v. *Southern Pac. Trans. Co.*, 809 F.2d 1167, 1169 (5th Cir. 1987), *cert. denied*, 484 U.S. 819 (1987) (rejecting unsupported expert testimony that porphyria was caused by dioxin). In the present case, the Third Circuit reversed its district court for having done exactly what the Fifth Circuit commands.

At least six other Circuits agree with the Fifth that unsupported expert testimony cannot create a genuine issue of material fact. See *Lynch* v. *Merrell-National Labs.*, 830 F.2d 1190, 1196 (1st Cir. 1987) ("the district court's firm rejection here of foundationless expert testimony was necessary, admirable, and entirely within the discretion of the court"); *Sterling* v. *Velsicol Chem. Corp.*, 855 F.2d 1188, 1209 (6th Cir. 1988) ("[w]ithout the requisite clinical tests and a widely accepted medical basis for reaching its conclusions, plaintiffs' experts' opinions are insufficient to sustain plaintiffs' burden of proof"); *Richardson* v. *Richardson-Merrell, Inc.*, *supra*, 857 F.2d at 829 ("expert witnesses are indispensable in a case such as this. But that is not to say that the court's hands are inexorably tied, or that it must accept uncritically any sort of opinion espoused by an expert merely because his credentials render him qualified to testify"); *Kenosha Liquor Co.* v. *Heublein, Inc.*, 895 F.2d 418, 420 (7th Cir. 1990) ("Expert opinions are worthless without data and reasons"); *Hasler* v. *United States*, 718 F.2d 202, 206 (6th Cir. 1983) (claim that swine flu vaccine had caused arthritis was unsupported as a matter of law when "the experts testified that there was no medical literature or evidence to support the plaintiff's theory of causation," and "any causal connection" was "merely conjectural"), *cert. denied*, 469 U.S. 817 (1984); *United States* v. *Various Slot Machines*, 658 F.2d 697, 700-01 (9th Cir. 1981) (summary judgment affirmed over expert opinions that lacked factual basis; "[i]t would be an imposition on the trial judge, and make a mockery of summary judgment proce-

dure, to hold otherwise"); *Wheelahan* v. *G.D. Searle & Co.*, 814 F.2d 655 (4th Cir. 1987), *affirming mem.* 630 F. Supp. 1087, 1089 (D. Md. 1986) ("It is particularly important to be assured that an inference of causation is based upon at least a reasonable probability of causation, in an effort to remove purely conjectural and speculative questions from the jury").

B. Conflict as to Implausible Claims.

In *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, *supra*, this Court held that a district court must grant summary judgment "if the claim is one that simply makes no . . . sense," 475 U.S. at 587—such as, for example, the assertion here that PCBs caused asthma in persons with a family history of asthma, when it was conceded that no other scientist had ever associated PCBs with that infirmity. The claim of the plaintiffs here—that exposure to minute amounts of PCBs had caused them to suffer dozens of diverse varieties of human illness—is on its face implausible, particularly when the record before the District Court was that in spite of years of intensive inquiry, no peer-reviewed scientific study had ever concluded that PCBs are capable of causing human beings to suffer anything more than temporary skin irritation. "[I]f the factual context makes the non-moving party's claim *implausible*, that party must come forward with more persuasive evidence than would ordinarily be necessary to show that there is a genuine issue for trial." *California Architectural Bldg. Prods., Inc.* v. *Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987) (emphasis in original), *cert. denied*, 484 U.S. 1006 (1988); *accord*, *Mid-State Fertilizer Co.* v. *Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989).

C. Conflict as to Failure to Eliminate Other Causes.

A physician diagnosing the cause of an illness considers and eliminates other possible causes. Respondents' own experts here recognized that only a physician is qualified to perform that process, which is called "differential diagnosis." See A. 37a; R. 5634. The Court of

Appeals acknowledged that no differential diagnoses from physicians had been presented, but asserted wholly incorrectly and without explanation that there were some from non-physicians. A. 50a, 77a. As the District Court found, A. 124a, the plaintiffs presented no differential diagnosis by anyone, and plaintiffs' experts themselves conceded that other possible causes existed.

Several Circuits hold that when other causes have not been eliminated, causation simply has not been proven. *Novak* v. *United States*, 865 F.2d 718, 722 (6th Cir. 1989); *Viterbo* v. *Dow Chem. Co.*, *supra*, 826 F.2d at 423; *Thompson* v. *Southern Pac. Trans. Co.*, *supra*, 809 F.2d at 1169; *Lynch* v. *Merrell-National Labs.*, *supra*, 830 F.2d at 1194.

D. Conflict as to Rule 56(f).

In *Celotex* this Court also held that "[a]ny potential problem with . . . premature [summary judgment] motions can be adequately dealt with under Rule 56(f)," which allows district courts to defer ruling on a summary judgment motion *if* the opposing party submits affidavits demonstrating need for further discovery. 477 U.S. at 326. Here respondents made no motion for further discovery under Rule 56(f). Nevertheless, the Third Circuit scolded that the District Court "did not give the plaintiffs sufficient opportunity to explore the issues." A. 61a.

At least four Circuits hold that summary judgment cannot be reversed for lack of discovery when there has been no Rule 56(f) motion. See *Chicago Florsheim Shoe Store Co.* v. *Cluett, Peabody & Co.*, 826 F.2d 725, 727 (7th Cir. 1987); *Gray* v. *Udevitz*, 656 F.2d 588, 592 (10th Cir. 1981); *Over the Road Drivers, Inc.* v. *Transport Ins. Co.*, 637 F.2d 816, 821 (1st Cir. 1980); *THI-Hawaii, Inc.* v. *First Commerce Financial Corp.*, 627 F.2d 991, 994 (9th Cir. 1980); *Brown* v. *Chaffee*, 612 F.2d 497, 504-05 (10th Cir. 1979). Nor could an unsupported assertion that more discovery might produce new facts upset summary judgment. *Washington* v. *Armstrong World Industries, Inc.*, 839 F.2d 1121, 1123 (5th Cir. 1988).

III. THE CREATION OF A NEW STATE CAUSE OF ACTION CONFLICTS WITH PLAIN HOLDINGS OF OTHER CIRCUITS AND OF THIS COURT.

Almost casually the Third Circuit here, in quasi-legislative fashion, reviewed the arguments favoring a new "medical monitoring" tort requiring no proof of physical injury, and decided to enact it.

Temptation no doubt exists for federal judges to create new state law when they conclude for "policy" reasons, A. 57a, that the state's statutes and jurisprudence are not sufficiently progressive. The Third Circuit here, in spite of recent Pennsylvania decisions that require physical injury as a precondition to recovery,[24] nevertheless "predicted" that one day Pennsylvania (unlike most states[25]) would recognize a "medical monitoring" tort for recovery of damages without any proof at all of physical injury. A. 56a. The Third Circuit's result is an entire new and unbounded category of tort litigation in the federal courts of Pennsylvania, of a kind which in the estimation of one court "could potentially devastate the court system." *Ball* v. *Joy Mfg. Co., supra.*

Other courts of appeals resist such temptations, as they are required to do by this Court's decisions in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938) (diversity), and *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966)

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[24] *E.g., Martin* v. *Johns-Manville Corp.*, 508 Pa. 154, 164-65, 494 A.2d 1088, 1093-94 (1985); *Houston* v. *Texaco, Inc.*, 371 Pa. Super. 399, 404, 538 A.2d 502, 504, *allocatur denied*, 520 Pa. 575, 549 A.2d 136 (1988).

[25] Although the Court of Appeals described its new tort as consistent with "the weight of authority," A. 56a, it is actually a tiny minority policy rejected in nearly all jurisdictions. See W. PROSSER & R. KEETON, TORTS 165 (5th ed. 1984); Anno., 50 A.L.R.4th 13, 216 (1986). The Court of Appeals appears to have adopted the elements of its new tort, A. 56a-57a, almost verbatim from a student note that called such a proposal "novel" and "innovative." See Note, 63 IND. L.J. 849, 858, 872 (1988). Recently the California Court of Appeal, specifically rejecting the Third Circuit's decision here, held that until and unless authorized by higher authority, "we decline to create a cause of action for medical monitoring." *Potter* v. *Firestone Tire & Rubber Co.*, 225 Cal. App. 3d 213, 232, 274 Cal. Rptr. 885, 896 (1990).

(pendent jurisdiction). As the Fourth Circuit recently held,

> "Federal courts are permitted under *Erie R.R. Co. v. Tompkins* . . . and *Gibbs* . . . to rule upon state law as it presently exists and not to surmise or suggest its expansion."

Washington v. *Union Carbide Corp.*, 870 F.2d 957, 962 (4th Cir. 1989). The Seventh Circuit has reiterated "our unwillingness to speculate on any trends in state law." *Shaw* v. *Republic Drill Corp.*, 810 F.2d 149, 150 (7th Cir. 1987). *Accord, e.g., In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990) ("Texas has made its policy choices"); *Hausman* v. *Buckley*, 299 F.2d 696, 704 (2d Cir.) ("the proper function of this Court is to ascertain what [state] law is, and not to speculate about what it will be"), *cert. denied*, 369 U.S. 885 (1962). Moreover, the Third Circuit here, contrary to other Circuits, failed to give any weight to the interpretation of Pennsylvania law by the district judge (and other district judges [26]) sitting in that state. See, *e.g.*, *Russell* v. *Salve Regina College*, 890 F.2d 484 (1st Cir. 1989), *cert. granted*, 110 S. Ct. 3269 (1990) (No. 89-1629).

IV. THE CIRCUITS ARE DIVIDED ON WHETHER AN APPEAL FROM AN INTERLOCUTORY ORDER CAN BE VALIDATED BY A LATER RULE 54(b) JUDGMENT.

A month ago in *FirsTier Mortgage Co.* v. *Investors Mortgage Ins. Co.*, 111 S. Ct. 648 (1991), this Court held

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[26] See *Villari* v. *Terminix Int'l, Inc.*, 663 F. Supp. 727, 735 n.5 (E.D. Pa. 1987) (Pollak, J.) ("The Villaris urge this court to predict that the Pennsylvania Supreme Court will . . . hold that the cost of future medical monitoring is a proper element of damages . . . . The Villaris have offered no basis for this prediction and we see none"); see also *Bubash* v. *Philadelphia Elec. Co.*, 717 F. Supp. 297 (M.D. Pa. 1989), in which the author of a case cited by the Court of Appeals, *Merry* v. *Westinghouse Elec. Co.*, 684 F. Supp. 847 (M.D. Pa. 1989), see A. 56a, clarified his reading of Pennsylvania law as follows: "Mrs. Bubash has been unable to show any physical injury or medically identifiable effect . . . . [W]e cannot say on this record that her claim is redressable under current Pennsylvania law."

that Rule 4(a)(2) of the Federal Rules of Appellate Procedure permitted a premature notice of appeal from an announced order that would be final when entered. What *FirsTier* did not specifically rule on is whether Rule 4(a)(2) applies in a situation where (1) a district court enters a clearly interlocutory order disposing of some but not all claims; (2) a notice of appeal is filed; and then (3) later the district court directs that a final judgment be entered pursuant to Rule 54(b), Fed. R. Civ. P. That question determines appellate jurisdiction in nine of the twenty-one consolidated cases here.[27]

In those nine cases, the plaintiffs sought to recover for both property damage and personal injury. The District Court announced on November 28, 1988, and entered the next day, an interlocutory partial summary judgment, limited to their personal injury claims. A. 139a. These plaintiffs filed a notice of appeal from that interlocutory order on December 23, 1988. Later, on January 4, 1989, the District Court granted a motion and entered a final judgment under Rule 54(b). A. 140a-142a. But these plaintiffs filed no notice of appeal from that final judgment.

Petitioners moved to dismiss these appeals under 28 U.S.C. § 1291, citing *Oak Constr. Co.* v. *Huron Cement Co.*, 475 F.2d 1220 (6th Cir. 1973), which squarely held that a notice of appeal from an interlocutory order cannot be validated by a subsequent Rule 54(b) certification. The Third Circuit nevertheless held it had jurisdiction. A. 24a n.6. The Tenth Circuit, over a vigorous dissent of two judges, agrees with the Third Circuit, as do some others. *Lewis* v. *B.F. Goodrich Co.*, 850 F.2d 641 (10th Cir. 1988) (*en banc*). But at least three Circuits follow the opposite rule. *General Television Arts, Inc.* v. *Southern Ry.*, 725 F.2d 1327, 1330-31 (11th Cir. 1984); see also *United States* v. *Hansen*, 795 F.2d 35, 37 (7th Cir.

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[27] Barbetta; Johnson; and Christopher, Cathlene, Craig, Celeste, Clemmon, Cloyd and Curtis Brown.

1986) (noting that "[t]he cases are split"); *Marsh-McBirney, Inc.* v. *Montedoro-Whitney Corp.*, 882 F.2d 498, 503 (Fed. Cir. 1989), *vacated and remanded*, 59 U.S.L. WEEK 3501 (U.S. Jan. 22, 1991) (No. 89-954); see also 9 J. MOORE, *et al.*, FEDERAL PRACTICE ¶ 204.14 at 4-129 (2d ed. 1990).

This Court in *FirsTier* cautioned that Rule 4(a)(2) applies only to notices of appeal from a "decision that *would be* appealable if immediately followed by the entry of judgment." 111 S. Ct. at 653 (emphasis in original). That is not the case where, as here, the decision was interlocutory was immediately entered, was appealed from, and only a later decision under Rule 54(b) created a subsequent appealable order. The conflict in the Circuits and with *FirsTier* should be resolved.

V. THE ISSUES ARE IMPORTANT.

"[U]kase in the guise of expertise is a plague in contemporary litigation." *Mid-State Fertilizer Co.* v. *Exchange Nat'l Bank*, *supra*, 877 F.2d at 1340. Judge Higginbotham of the Fifth Circuit recently stressed the need for an authoritative decision on

> "the role of experts in the federal courts including whether we should accept opinions of experts not based upon a generally accepted scientific principle . . . . [W]e ought not leave this lion in the busy street of our trial courts and inevitably multiply the appellate workload."

Brock v. *Merrell Dow Pharmaceuticals, Inc.*, *supra*, 884 F.2d at 168, 170 (dissenting from denial of rehearing *en banc*). Officials of the Executive Branch as well have worried that

> "it has become all too common for 'experts' or 'studies' on the fringes of or even well beyond the outer parameters of mainstream scientific or medical views to be presented to juries as valid evidence from which conclusions can be drawn."

REPORT OF THE TORT POLICY WORKING GROUP 35 (1986).[28]

The Third Circuit here has rendered a major and deviant opinion. The inevitable trend, under the Third Circuit's doctrine, will be towards breakdown of the admissibility standards that some Circuits have developed, and towards ever more extreme and unreliable scientific testimony, for "[a]n expert can be found to testify to the truth of almost any factual theory, no matter how frivolous." Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 482 (1986).

"Basic policy questions that affect the very nature of a trial lie behind decisions to receive expert testimony." *In re Air Crash Disaster*, 795 F.2d 1230, 1233 (5th Cir. 1986). In most Circuits, district judges have been allowed to exercise the screening control that the Third Circuit now has undermined. It is time for this Court to decide which of the Circuits is correct.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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[28] See also, *e.g.*, Huber, *On Law and Sciosophy*, 24 VALPARAISO L. REV. 319 (1990); Imwinkelried, *Science Takes the Stand: The Growing Misuse of Expert Testimony*, 26 THE SCIENCES 20 (1986).

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